IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No 286 of 1987

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.SHAH Sd/-
and
Hon'ble MR.JUSTICE D.A.MEHTA Sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

COMMISSIONER OF INCOME TAX

Versus

ARVIND MILLS LIMITED

Appearance:

1. INCOME TAX REFERENCE No. 286 of 1987

MR BB NAYAK FOR MR MR BHATT for Applicant.

MR JP SHAH WITH MR MANISH J SHAH for Respondent.

CORAM : MR.JUSTICE M.S.SHAH
and
MR.JUSTICE D.A.MEHTA

Date of decision: 11/09/2001

ORAL JUDGEMENT

(Per : MR.JUSTICE D.A.MEHTA)

The Income Tax Appellate Tribunal, Ahmedabad Bench 'A' has referred the following five questions for the opinion of this Court :

1 "Whether, the reimbursement of medical expenses and House Rent Allowance to the Managing Directors are to be considered for the purpose of computing the disallowance under sec.40(c) of the Act."

2 "Whether, the cash payment of House Rent Allowance to the employees is to be considered for purpose of computing the disallowance u/s.40A(5) of the Act."

3 "Whether, in law and on facts, the assessee is entitled to a deduction of Rs.2,69,842/- paid to M/s.Mettur Beardsell Ltd., on account of royalty".

4 "Whether, the disallowance under Rule 6D is to be computed by grouping together all the tours undertaken by a person during the year".

5 "Whether, in law and on facts, the assessee was entitled to deduction under section 80-HHC of the Act".

2 The assessment year is 1984-85 and the relevant accounting period is 1983. So far as question Nos. 1 to 4 are concerned, it is common ground between the parties that the issues are concluded by the decisions of the Apex Court or this Court and hence, it is not necessary to set out the facts in detail.

3 Question No.1 is in relation to two items, viz. (i) reimbursement of medical expenses and (ii) House Rent Allowance paid to Managing Directors and whether the said items are required to be considered for the purpose of computing the limits for disallowance under section 40(c) of the Income Tax Act,1961 (hereinafter referred to as 'the Act'). In so far as the reimbursement of medical expenses is concerned this Court in the case of Aroon K. Basak Vs. Union of India, 236 I.T.R. 931 has laid down that the same is required to be considered for the purpose of computing disallowance under section 40(c) of the Act. As far as House Rent Allowance is concerned,

the Apex Court has in the case of Commissioner of Income Tax Vs. Mafatlal Gangabhai & Co. (P) Ltd., 219 I.T.R. 644 laid down that the said item is not to be included for the purpose of disallowance under section 40(c) of the Act. The question No.1 is therefore answered accordingly i.e.the first portion against the assessee and the second portion against the revenue.

4 The second question is also concluded by the Supreme Court in the case of Commissioner of Income Tax Vs. Mafatlal Gangabhai & Co. (P) Ltd. (supra) and for the reasons stated in the said decision, it has to be held that cash payment of House Rent Allowance paid to the employees is not to be considered for the purpose of computing disallowance under section 40A(5) of the Act. The second question is therefore answered in the negative i.e. in favour of the assessee and against the revenue.

5 The third question is concluded by the decision of this Court in the case of Commissioner of Income Tax Vs. Ashoka Mills Ltd., 218 I.T.R.526, wherein it is held that payment of account of royalty to M/s. Mettur Beardsell Ltd. is a deductible item of expenditure. The third question is therefore answered in the affirmative i.e. in favour of the assessee and against the revenue.

6. In so far as the question No.4 is concerned in an unreported decision in the case of C.I.T. vs. Nutan Mills Ltd., in Income Tax Reference No. 54 of 1988 dated 6/2/2001, it is held that the disallowance under Rule 6D of the Income Tax Rules, 1962 has to be computed by taking each trip undertaken by an employee separately and all the tours undertaken by such a person during the year have not to be clubbed together for the purpose of computing the disallowable limit. We accordingly answer the question No.4 in the negative i.e. in favour of the revenue and against the assessee.

7. So far as question No.5 is concerned, the Tribunal has relied upon its own order in Income Tax Appeal No.2689/AHD/1985 with Cross Objection No.69/AHD/1986 for assessment year 1983-84 and has therefore not assigned any independent reason in the order under Reference, because according to Tribunal there is no difference in the facts and circumstances for the assessment years in question. In so far as the issue regarding 80HH of the Act is concerned, the revenue had come up in Appeal in assessee's own case and the said Reference was registered as Income Tax Reference No.134 of 1987. The said matter was also taken up for hearing today by consent of both the sides along with

this Reference.

8. We have heard Mr.B.B.Nayak, learned Standing Counsel for the Revenue and Shri J.P.Shah, learned Counsel for the assessee. It was submitted by Mr.Nayak that the provision of section 80AB of the Act are applicable to all the sections which fall under the heading - " C - deductions in respect of certain incomes" and that section 80HHC is a provision which falls within the said heading. Elaborating on the contention raised, it was submitted that it was necessary that there should be profits from export activity and in absence of such profits from export business the Tribunal was clearly in error in holding that the assessee was entitled to deduction under section 80HHC of the Act against the income from other head viz. capital gains as in the present case. Reliance was placed on the following decisions in support of his submissions :

(1) Commissioner of Income Tax Vs. V.T. Joseph, 225 I.T.R. 731 (Kerala).

(2) Commissioner of Income Tax Vs. K.K.Doshit & Co. 245 I.T.R. 849 (Bombay)

(3) Commissioner of Income Tax Vs. M.K.Raju Consultants, 205 I.T.R. 433 (SC)

(4) Commissioner of Income Tax Vs. M.K.Raju Consultants, 239 ITR 232 (Mad).

9 As against this, on behalf of the assessee Mr.Shah has submitted that the provisions of section 80HHC were unambiguious and on a plain reading it was not possible to state that the said section was governed by provision of section 80AB of the Act. Mr.Shah further submitted that the provision of Section 80HHC of the Act as it stood for the relevant assessment year did not envisage that there should be any profits from the business of exports and the language as employed in Section did not support the proposition canvassed by the revenue. He further contended that the provision of Section 80AB in the opening portion read as : "deductions in respect of certain incomes" in respect of any income of the nature specified in that section which is included in the gross total income of the assessee : that in the case of the provision of Section 80HHC there was no question of claiming deduction in respect of any income, because the Section did not provide that any income of the nature specified in Section 80HHC was to be included in the gross total income. Referring to Section

80HHC, it was submitted that an assessee would be entitled to a deduction of a specified amount of the export turnover of such goods or merchandise as specified. That the deduction was neither envisaged as percentage of the income nor was it necessary to establish that the business from exports had resulted into profits. Section 80HHC and Section 80AB as they stood for the years under consideration are in the following terms :

"80HHC.(1) Where an assessee, being an Indian company or a person (other than a company) resident in India, is engaged in the business of export out of India of any goods or merchandise to which this section applies, there shall, in accordance with and subject to the provisions of this section, be allowed, in computing the total income of the assessee, the following deductions, namely :-

(a) a deduction of an amount equal to one per cent of the export turnover of such goods or merchandise during the previous year; and

(b) a deduction of an amount equal to five per cent of the amount by which the export turnover of such goods or merchandise during the previous year exceeds the export turnover of such goods or merchandise during the immediately preceeding year.

(2)(a) This section applies to all goods or merchandise [other than those specified in clause (b)] if the sale proceeds of such goods or merchandise exported out of India are receivable by assessee in convertible foreign exchange.

(b) The goods or merchandise referred to in clause (a) are the following namely :-

(i) agricultural primary commodities, not being produce of plantations;

(ii) mineral oil;
(iii) minerals and ores; and
(iv) such other goods or merchandise as the

Central Government may, by notification in the Official Gazette, specify in this behalf.

(3) No deduction under clause (b) of sub-section (1) shall be allowed unless the India goods or merchandise to which this section applies.

Explanation : For the purposes of this section, -

(a) 'convertible foreign exchange' means foreign exchange which is for the time being treated by the Reserve Bank of India as convertible foreign exchange for the purposes of the Foreign Exchange Regulation Act,1973 (46 of 1973), and any rules made thereunder;

(b) 'export turnover' means the sale proceeds of any goods or merchandise exported out of India, but does not include freight or insurance attributable to the transport of the goods or merchandise beyond the customs station as defined in the Customs Act,1962 (52 of 1962).]

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"80AB Where any deduction is required to be made or allowed under any section included in this Chapter under the heading 'C.-Deductions in respect of certain incomes' in respect of any income of the nature specified in that section which is included in the gross total income of the assessee, then, notwithstanding anything contained in that section, for the purpose of computing the deduction under that section, the amount of income of that nature as computed in accordance with the provisions of this Act (before making any deduction under this Chapter) shall alone be deemed to be the amount of income of that nature which is derived or received by the assessee and which is included in his gross total income".

10. On a plain reading of Section 80HHC, it is apparent that a deduction can be claimed by an assessee if such assessee exports out of India during the previous year relevant to assessment year any goods or merchandise as specified in the section, the deduction has to be made

while computing total income of the assessee of an amount specified of the export turnover of such goods or mercandise. Whereas section 80AB requires that a deduction which is required to be made or allowed under any section (except section 80M) included in Chapter VIA under the heading -" C- deductions in respect of certain incomes" in respect of any income of the nature specified in that section which is included in the gross total income of the assessee. As can be seen there is no income of the nature specified in Section 80HHC(as it then stood) which would be included in the gross total income of the assessee, and if that is so, it would not be possible to read that such was requirement of section 80HHC of the Act.

11 Heading 'C' which deals with deductions in respect of certain incomes commences with provision of Section 80HH and ends with 80TT of the Act. When we compare the language of all the provisions which fall under heading 'C' of Chapter VIA, we find that except for section 80HHC in all other provisions the language used is to the effect that where gross total income of an assessee includes any profits and gains as specified a deduction has to be allowed from such profits and gains of the specified amount in each of the provisions. On comparison section 80HHC stands out by virtue of the language employed and it is not possible to state that on a plain reading it would fall within the same set of provisions which have been contemplated to be governed by provisions of Section 80AB of the Act.

12 Section 80AB of the Act was introduced by Finance (No.2) Act of 1980 with effect from 1/4/1981. While section 80HHC was introduced by Finance Act,1983 with effect from 1/4/1983. Therefore, the contention raised on behalf of the Revenue that Section 80AB should override the provision of Section 80HHC cannot be accepted as it is not possible to hold that the legislature was not aware of the difference in other provisions falling under heading 'C' of Chapter VIA and the language employed in Section 80HHC of the Act. To the contrary, there is an inherent indication in the Act when one reads the provision of Section 80HHB of the Act which was introduced by the Finance Act,1982 with effect from 1/4/1983. The language employed in both the provisions is entirely different though both the provisions have been made effective from the same date.

13. Considering the matter from slightly different angle, the provision of Section 80 HHC requires that deduction is to be made from total income of an assessee.

The scheme of the Act as can be seen is to fasten the charge of income tax by virtue of Section 4 of the Act in respect of the total income of the previous year. The term 'total income` has been defined by Section 2(45) of the Act to mean the total amount of income referred to in Section 5, computed in the manner laid down in this Act. Section 5 deals with a scope of total income to provide that the 'total income` of any previous year would include all income from whatever source. Once the legislature has provided for inclusion of all incomes, the definition of 'income' as provided in Section 2(24) of the Act becomes relevant. Sub-clause (vi) of Section 2(xxiv) states that income includes any capital gains chargeable under section 45 of the Act. Therefore, once capital gains forms part of the income, which is to be included for the purpose of ascertaining total income, the charge specified in Section 4 of the Act gets attracted. Thus, moment this exercise has been undertaken, the figure of total income is arrived at and it is from this figure that deduction u/s. 80HHC is provided being the specified percentage of the export turn over.

14 The decision of Kerala High Court in the case of Commissioner of Income Tax Vs. V.T. Joseph (supra) 225 ITR 731 relied upon by the learned Counsel for the revenue is rendered on 26/9/1996. While the decision of Kerala High Court in the case of Commissioner of Income Tax Vs. A.V.Thomas & Co. Ltd., 225 ITR 29 has been rendered on 10/1/1997. The view expressed by the Kerala High Court in the latter decision in the case of A.V.Thomas (supra) commends itself to us. Moreover the decision of Bombay High Court in the case of C.I.T. vs. Shirke Construction Equipments Ltd. 246 ITR 429 has already taken into consideration both the aforesaid decisions of Kerala High Court and the Bombay High Court has dissented respectfully from the earlier view of Kerala High Court in the case of V.T.Joseph (supra) and agreed with the decision in the case of A.V.Thomas and Company Limited (supra). The Bombay High Court has specifically held that Section 80AB does not control section 80HHC and that section 80HHC is a complete Code by itself. We are, therefore, in respectful agreement with the view expressed by the Bombay High Court in the case of Shirk Construction Equipments Ltd.(supra).

15. Mr.Shah in support of his contention referred to Supreme Court decision in the case of Commissioner of Income Tax Vs. Strawboard Manufacturing Co. Ltd., 177 I.T.R. 431 to contend that while interpreting relief giving provision liberal interpretation should be adopted

and the provision must be so read as to effectuate the intention of granting relief instead of curtailing the same. Mr.Shah also pressed into service Supreme Court decision in the case of Mysore Minerals Ltd. Vs. Commissioner of Income Tax, 239 ITR 775, in support of his submission that where two interpretations were possible an interpretation in favour of the assessee should be adopted. While arriving at the aforesaid decision we have borne in mind the principles stated by the Apex Court in the aforesaid decisions.

16. In view of the aforesaid discussion we hold that the Tribunal had rightly held that the assessee was entitled to deduction u/s. 80HHC of the Act on the facts and in the circumstances of the case. Question No.5 is therefore answered in the affirmative i.e. in favour of the assessee and against the revenue.

17. The Reference stands disposed of accordingly with no order as to costs.

Sd/- Sd/-
(M.S.Shah, J) (D.A.Mehta, J)

m.m.bhatt